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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 30

THE KLAMATH AND MOADOC TRIBES AND YAHOOSKIN BAND OF SNAKE INDIANS,
Petitioners,

v.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

REPLY BRIEF FOR PETITIONERS.

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INDEX.

Subject Index.

	Page
I. As to the construction of the jurisdictional act	1-5
II. As to whether the Klamath Tribes were bound by the alleged release	5-6
III. As to the value of the Indians' interest in the 87,000 acres	6-19
IV. As to the finding of the Court of Claims that the Indians made no claim for additional compensation for the 87,000 acres prior to the filing of the petition in this case	19

Cases.

Ash Sheep Co. v. United States, 252 U. S. 159, 64 L. ed. 507	13
Beecher v. Wetherby, 95 U. S. 517, 24 L. ed. 440	11, 12
Butts v. Northern Pacific R. R. Co., 119 U. S. 55, 30 L. ed. 330	17
California & Oregon Land Co. v. Rankin, 87 Fed. 532	17
California & Oregon Land Co. v. Worden, 85 Fed. 94	16
Cherokee Nation v. Southern Kansas R. Co., 135 U. S. 641, 34 L. ed. 295	17
Choctaw Nation v. United States, 119 U. S. 1, 30 L. ed. 306	19
Jones v. Meehan, 175 U. S. 1, 44 L. ed. 49	19
Leavenworth, etc., R. R. Co. v. United States, 23 Wall. 733, 23 L. ed. 634	10, 11
Luckenbach S. S. Co. v. United States, 272 U. S. 533, 71 L. ed. 394	7
Marlin v. Lewallen, 276 U. S. 58, 72 L. ed. 467	19
McLean v. United States, 226 U. S. 374, 57 L. ed. 260	4
Mille Lac Band of Chippewas v. United States, 46 Ct. Cl. 424	16
Missouri, K. & T. R. R. Co. v. Roberts, 152 U. S. 114, 38 L. ed. 377	17
Mitchell v. United States, 9 Pet. 711, 9 L. ed. 283	7
Ross v. Day, 232 U. S. 110, 58 L. ed. 528	6
Southern Kansas Ry. Co. v. Briscoe, 144 U. S. 133, 36 L. ed. 377	4
Spalding v. Chandler, 160 U. S. 394, 40 L. ed. 469	12
United States v. California & Oregon Land Co., 192 U. S. 355, 48 L. ed. 476	16, 18
United States v. Cook, 19 Wall. 591, 22 L. ed. 210	7, 8, 11
United States v. Pugh, 99 U. S. 265, 25 L. ed. 322	6
Whitcomb v. White, 214 U. S. 15, 53 L. ed. 889	6
Worcester v. State of Georgia, 6 Pet. 515, 8 L. ed. 483	7, 19

Other Citations.

34 Ops. A. G. 171	12, 15, 16
Act of April 4, 1910, c. 140, 34 Stat. 284	4
Act of March 4, 1933, c. 275, § 1, 47 Stat. 1568	17

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I.

As to the construction of the jurisdictional act.

1. The Government's contention that the jurisdictional act applies only to claims existing at the time of its passage is but another way of saying that the act does not authorize the reopening of any claim once settled—a contention already answered.

Briefly recapitulating,—

That the description, "all claims of whatsoever nature which the Klamath * * * Indians * * *. may have against the United tSates," § 1, was not intended to be limited to claims existing or outstanding at the time of the passage of the jurisdictional act, is made clear—

First, by the specific exception of claims "heretofore * * * determined by the Court of Claims," § 1.

This exception was wholly unnecessary if the description of the claims authorized to be submitted included only claims existing or outstanding at the time of the passage of the act.

Second, by the provision of the act that "any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel," § 2.

Unless this applies to claims which had been discharged by payment in full, and therefore no longer outstanding, it means nothing, because, of course, in no event would a payment on account operate as an estoppel.

Third, by the legislative history of the jurisdictional act.

After all the explaining in the Government's brief, the facts remain that prior to the passage of the jurisdictional act the Indians and the United States entered into an agreement, which was ratified by Congress, under the terms of which the Indians were paid over half a million dollars,

> "*in full* of all claims and demands of said Klamath and other Indians arising or growing out of the erroneous survey of the outboundaries of their Reservation in 1871." [Italics ours.]

Yet these very claims are among those mentioned in the reports of the House and Senate Committees on Indian Affairs as the occasion for recommending the passage of

the jurisdictional act, and this prior settlement was not only known to the Committees but copied in the Reports, showing that the act was intended to apply to claims which had been settled (other than claims settled by adjudication of the Court of Claims), as well as to unsettled claims.

The statement in the Government's brief that, "No money could properly be 'due' upon a claim which had been determined and which by a performed agreement of settlement had lost its character as a claim," p. 10, is but another form of the contention that the jurisdictional act applies only to claims existing at the time of its passage.

If we are right that by virtue of § 2 of the jurisdictional act acceptance of the $108,750 by the Indians in full payment cannot be set up against them as an estoppel, the difference between what was just compensation under the Constitution for the 87,000 acres and the $108,750 already paid is just as much money due the Indians as if the release had never been given.

It is said that the provision of § 2 waiving the defense of estoppel "relates solely to defenses that may be made to claims authorized to be submitted." P. 11.

We agree. But, as heretofore shown, by that very provision Congress authorized the submission of settled as well as unsettled claims, excepting only claims previously determined by the Court of Claims.

2. The assertion that, "It has long been established by the rulings of this Court that under special jurisdictional acts there can be no adjudication of any Indian claims depending upon the setting aside or abrogation of any article of a treaty," pp. 10-11, is, as already shown, based on a misinterpretation of the decisions. The *Choctaw Case*, 119 U. S. 1, 30 L. ed. 306, among others, was one in which the claim adjudicated depended for its validity upon the setting aside of a settlement between the Indians and the

United States. It all depends upon the language of the particular jurisdictional act. See Petitioners' Main Brief, pp. 15-16.

3. The remaining ground for the contention that the present claim is not within the jurisdictional act is that the reports of the Congressional Committees recommending its passage "described two claims which were to be submitted," and this was not one of the two, p. 13; that "no other claims of any character or description were submitted to or acted upon by Congress," p. 14; that "Congress definitely indicated the particular claims which were to be submitted to the Court of Claims, and the present claim was not included," p. 15.

But the act itself is not limited to any specific claim or claims or class of claims. It extends to "*all* claims of whatsoever nature which the Klamath • • • Indians • • • may have against the United States, which have not heretofore been determined by the Court of Claims." [Italics ours.]

Frequently a particular case leads to the enactment of a statute applicable to *all* cases of a given class. We had supposed it to be accepted that such a statute operates upon every case that comes within its terms—not merely upon the particular case that gave rise to its enactment.

"All," as this Court has said, "excludes the idea of limitation." *McLean* v. *United States*, 226 U. S. 374, 383, 57 L. ed. 260, 264; also *Southern Kansas Ry. Co.* v. *Briscoe*, 144 U. S. 133, 36 L. ed. 377.

Where Congress in granting an Indian tribe the right to sue the United States has intended to limit the right to a particular claim the statute has specified the claim. For example, see Act of April 4, 1910, c. 140, 34 Stat. 284.

Acceptance of the Government's contention would require the Court to substitute for a statute authorizing the

Court of Claims to hear and determine "all claims of whatsoever nature which the Klamath Indians • • • may have against the United States, which have not heretofore been determined by the Court of Claims," a statute authorizing the Court of Claims to hear and determine two certain claims of the Klamath Indians, (1) "for the recovery of money wrongfully taken from [them] to pay a judgment rendered against another tribe," and (2) "for lands said to have been lost by reason of an erroneous survey." P. 13.

This would be legislating, and with a free hand.

II.

As to whether the Klamath Tribes were bound by the alleged release.

The only answer that the Government makes to petitioners' contention that the alleged release was not the act of the Klamath Tribes and therefore was ineffectual to relinquish any rights of the tribes is that the Court of Claims by its findings has foreclosed that question. Pp. 16-17.

The question on this branch of the case is whether an alleged release of property rights of the Klamath Tribes, not authorized or approved by a majority of the adult members of the Tribes, or even a majority of the adult *male* members, in general council assembled, nor even voted upon at all in general council, is binding upon the Tribes.[1]

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[1] In its statement of facts on this branch of the case the Government's brief states that "the final result of the two council meetings was that 150 adult male Indians signed the release." P. 4.

It might be inferred from this statement that 150 adult male Indians signed the release at these two meetings. This is not the fact. An unknown number of the 150 signed at other times and places. See petitioners' Main Brief, pp. 21-22.

This is obviously a question of law and therefore any attempt by the Court of Claims to preclude a review of the question by incorporating its conclusions with respect to it in findings of fact would be inadmissible. *United States* v. *Pugh*, 99 U. S. 265, 25 L. ed. 322.

Nor has the Court of Claims made any such attempt.

While the Government's brief asserts that the Court of Claims "made specific findings that the * * * release [was] executed through the usual channels, that the release was properly executed, and that no duress was used," citing Findings of Fact XV, XVI and XVII, R. 25 and 26, we have been unable to find any such statements in the Findings of Fact cited or any others.

Furthermore, even assuming the question as to the binding effect of the alleged release upon the Klamath Tribes to be a question of mixed law and fact, as the Government suggests, and assuming further that the Court of Claims had made a finding on that question, the finding would not be conclusive unless it were impossible to separate the question so as to see whether any error of law had been committed. *Whitcomb* v. *White*, 214 U. S. 15, 17, 53 L. ed. 889, 891; *Ross* v. *Day*, 232 U. S. 110, 117, 58 L. ed. 528, 530.

III.

As to the value of the Indians' interest in the 87,000 acres.

In its brief in opposition to the petition for certiorari the Government challenged the finding of the Court of Claims as to the value of the Indians' interest in the 87,000 acres at the time of the taking on the ground that it "included the merchantable value of the timber thereon," and that "the Indians had no greater interest in the lands than that of *tenants for life*." P. 7. [Italics ours.]

In the present brief it challenges the finding on the ground that the Indians have no property right in the tim-

ber whatever because "by the express terms of the treaty (Article I) they were *tenants at will only.*" P. 17. [Italics ours.]

A finding of the Court of Claims as to the value of property taken under authority of an act of Congress is a finding of fact and therefore not reviewable. *Luckenbach S. S. Co.* v. *United States*, 272 U. S. 533, 540, 71 L. ed. 394, 397.

Assuming, however, that the finding is reviewable, and assuming further that the Court of Claims included the whole value of the timber on the 87,000 acres, the finding must be sustained, as the *whole* beneficial interest in timber, etc. on the Indian reservations—not merely the interest of a life tenant or of a tenant at will—belongs to the respective tribes.

As standing timber is part of the land, *United States* v. *Cook*, 19 Wall. 591, 593, 22 L. ed. 210, 211, the rights of an Indian tribe in the timber on the lands of a reservation held by the tribe under the usual Indian title depends upon the nature of that title.

The nature of the Indian title has been discussed in many cases. In *Worcester* v. *State of Georgia*, 6 Pet. 515, 580, 8 L. ed. 483, 508, it was said:

> "• • • Their right of occupancy has never been questioned, but the fee in the soil has been considered in the government. This may be called *the right to the ultimate domain*, but the Indians have a present right of possession." [Italics ours.]

And again in *Mitchell* v. *United States*, 9 Pet. 711, 746, 9 L. ed. 283, 296:

> "Indian possession or occupation was considered with reference to their habits and modes of life; their hunting-grounds were as much in their actual posses-

> sion as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals. • • •
>
> "• • • it is enough to consider it as a settled principle that their right of occupancy is considered as sacred as the fee-simple of the whites."

In *United States* v. *Cook*, 19 Wall. 591, 22 L. Ed. 210, the controversy was over the ownership of logs cut from the Oneida Indian Reservation in Wisconsin by a member of the tribe for the sole purpose of sale. Holding, as had always been held, that the Indians in possession of a reservation have only a right of occupancy in the land and that the fee is in the United States, it was decided that the members of the Oneida Tribe had no right to cut the timber on the land solely for the purpose of sale; that to do so was waste as in the case of the cutting of timber by a trespasser; and that the United States as the owner of the fee became the owner of the logs.

In reaching its conclusion the Court considered the nature and attributes of the Indian right of occupancy, saying:

> "The right of the Indians to their occupancy is as sacred as that of the United States to the fee, • • •."
> 19 Wall. 593, 22 L. ed. 211.

And that—

> "This right of use and occupancy by the Indians is *unlimited*. They may exercise it at their discretion. If the lands in a state of nature are not in a condition for profitable use, they may be made so. If desired for the purposes of agriculture, they may be cleared of their timber to such an extent as may be reasonable under the circumstances. The timber taken off by the Indians in such clearing may be sold by them. But to

justify any cutting of the timber, except for use upon the premises, as timber or its product, it must be done in good faith for the improvement of the land. The improvement must be the principal thing, and the cutting of the timber the incident only. Any cutting beyond this would be waste and unauthorized.

"The timber, while standing, is a part of the realty, and it can only be sold as the land could be. The land cannot be sold by the Indians, and consequently the timber, until rightfully severed, cannot be. It *can* be rightfully severed for the purpose of improving the land, or the better adapting it to convenient occupation, but for no other purpose. When rightfully severed it is no longer a part of the land, and there is no restriction upon its sale. Its severance under such circumstances is, in effect, only a legitimate use of the land." 19 Wall. 593, 22 L. ed. 211. [Italics ours.]

In the Court below the Government argued that the *Cook Case* decided that the interest of the Indians in the timber on their reservations "is that of a life tenant and no more." The Court did say, "What a tenant for life may do upon the lands of a remainder-man the Indians may do upon their reservations, but no more." 19 Wall. 594, 22 L. ed. 211.

But in thus comparing the position of the Indians with that of a tenant for life for the purpose of laying down a rule as to what things the Indians may and may not do on their reservations the Court could not possibly have meant that the Indians' *interest* in the lands of the reservations is only that of a tenant for life. For that would have been directly in conflict with its carefully formulated statement of the nature of the Indian title after reviewing prior cases—that the Indians have a right of use and occupancy of *unlimited duration* and an accompanying right of *unlimited duration* to cut timber for use upon the premises and also for the purpose of improving the land or the better adapting it to

convenient occupation and the right to sell all timber cut for that purpose.

In *Leavenworth, etc., R. R. Co.* v. *United States*, 23 Wall. 733, 23 L. ed. 634, the case was this: The Treaty of June 2, 1825, between the United States and the Osage Tribes of Indians, 7 Stat. 240, reserved for the occupancy of the Indians for an unlimited period a tract of land lying within the boundaries of what subsequently became a part of the State of Kansas. By an act approved March 3, 1863, 12 Stat. 772, Congress granted to the State every alternate section of land on each side of a projected line of railroad to aid in its construction. The state assigned the grant to the plaintiff in error. The line of the proposed railroad traversed part of the reservation of the Osage Indians. By the Treaty of January 21, 1867, 14 Stat. 687, the Indians ceded a part of their reservation, including the part through which this railroad passed, to the United States.

The question was whether the grant made by the Act of March 3, 1863, included the interest of the United States in the sections of land contiguous to the railroad in the Osage Reservation. It was held that this could not have been intended for the reason among others that the interest of the United States, being only a fee in reversion subject to a perpetual right of occupancy in the Indians, would have been of no immediate practical benefit for the purpose of the grant. 23 Wall. 743, 23 L. ed. 638.

Referring to the nature of the Indian title in general, the Court said:

> "As long ago as in *Cherokee Nation* v. *Georgia*, 5 Pet. 1, this court said that the Indians are acknowledged to have the unquestionable right to the lands they occupy, until that right shall be extinguished by a voluntary cession to the Government; and recently, *United States* v. *Cook*, 19 Wall. 591, 22 L. ed. 210, this

right of occupancy has been held to be sacred as the title of the United States to the fee." 23 Wall. 742, 23 L. ed. 638.

In *Beecher* v. *Wetherby*, 95 U. S. 517, 24 L. ed. 440, the question was as to the ownership of logs cut from a tract of land claimed by the defendant under a grant from the State of Wisconsin made in 1870. The tract was within the limits of a grant of public lands from the United States to the State on the occasion of its admission into the Union in 1848.

The defendant's title was disputed on the ground that the tract was part of the land reserved for the occupancy of the Menomonee Tribe of Indians by the Treaties of 1825 and 1831 and therefore did not pass to the State by the grant of 1848.

It was held, citing *United States* v. *Cook, ante*, that while the Indians had a right of occupancy in the tract as a part of their reservation, the United States could and did by the grant of 1848 transfer the fee,[1] 95 U. S. 525, 526, 24 L. ed. 441, 442; that this was only a "*naked fee*," however, 95 U. S. 525, 24 L. ed. 441, "subject • • • to the existing occupancy of the Indians *so long as that occupancy should continue*," 95 U. S. 526, 24 L. ed. 442; that, nevertheless, the logs belonged to the defendant because before they were cut the Indians had removed from the land, causing the right of possession to attach itself to the fee, 95 U. S. 526-527, 24 L. ed. 442. [Italics ours.]

In other words the interest of the United States in the Indian land being only a *naked fee* did not embrace any vested rights in the timber but only a right contingent on the Indian occupancy coming to an end—a contingency

[1] There were no circumstances present, as in *Leavenworth, etc., R. R. Co.* v. *United States, ante*, indicating an intention *not* to transfer the fee.

which happened in that case but might not happen in another.

Referring to *Beecher* v. *Wetherby*, Attorney General Stone in an opinion to the President dealing with the question "whether the Indians' right of 'occupancy and use' included any right to the hidden and latent resources of the land," said:

> "If a transfer by the United States would convey only the naked fee, it goes without saying that the complete equitable property was in the Indians. The earlier and fundamental decisions make this plain. In *Worcester* v. *Georgia*, 6 Pet. 515, 544, 545, Chief Justice Marshall clearly states that the right asserted in behalf of the discovering European nations was merely a right, *as against each other*, which he defines as 'the exclusive right of purchasing such lands as the natives were willing to sell.' As late as 1872 the Supreme Court said: 'Unmistakably their title was absolute, subject only to the preemption right of purchase acquired by the United States as the successors of Great Britain, and the right * * * to prohibit the sale of the land *to* any other governments or their subjects.' (*Holden* v. *Joy*, 17 Wall. 211, 244.)" 34 Ops. A. G. 171, 181.

In *Spalding* v. *Chandler*, 160 U. S. 394, 402-403, 40 L. ed. 469, 472, Chief Justice White summarized the prior decisions on this subject as follows:

> "It has been settled by repeated adjudications of this Court that the fee of the lands in this country in the original occupation of the Indian tribes was from the time of the formation of this government vested in the United States. The Indian title as against the United States was merely a title and right to the *perpetual occupancy* of the land with the privilege of using it in such mode as they saw fit, until such right of occupation had been surrendered to the government. When Indian reservations were created, either by treaty or executive order, the Indians held the land by the *same*

character of title, to wit, the right to possess and occupy the lands for the uses and purposes designated." [Italics ours.]

In *Ash Sheep Co.* v. *United States*, 252 U. S. 159, 64 L. ed. 507, the question was whether the pasturing of cattle on the Crow Indian Reservation in Montana without the consent of the Indians violated R. S. U. S. § 2117, prohibiting the pasturing of cattle "on any land belonging to any Indian or Indian tribe, without the consent of such tribe."

This was a reservation "set apart for the absolute and undisturbed use and occupation of the Indians," Treaty of May 7, 1868, 15 Stat. 649, 650, so that the Crows had only the ordinary Indian title—the right of use and occupation.

The cattle in question were pastured on a part of the reservation which had been ceded to the United States, to be sold for the benefit of the Indians, and the contention was that this part at least was not "land belonging to any Indian tribe."

It was held, however, that even this part of the reservation, until sold by the United States, was "land belonging to [an] Indian tribe," as the United States held it only as a trustee.

Thus the respective rights of an Indian tribe and of the United States in a reservation occupied by the tribe under what is called the Indian title, whether aboriginal or based on treaty, are as follows:

First, the Indians have a right of occupancy in perpetuity, i. e., until voluntary abandonment (subject of course like all private rights to termination by the United States in the exercise of its powers as sovereign upon payment of just compensation), and, so long as they do not commit waste, may exercise this right at their discretion—in such mode as they see fit; that as regards standing timber in particular, while they may not cut it for the *sole* purpose of sale, as

that would be waste, they are entitled to cut it as long as their right of occupancy continues, i. e., for an unlimited time, for "use upon the premises," and "for the purpose of improving the land or the better adapting it to convenient occupation," and are entitled to sell all timber cut for the latter purpose.

Second, the United States has a "naked fee," "the right to the ultimate domain," which gives it the right to prevent waste and to recover the proceeds of anything severed from the land by acts constituting waste, but nothing more unless the Indians should abandon possession, in which event the right of possession would attach to the fee.

In other words the whole beneficial interest belongs to the Indians.

The acts of Congress and the acts and official statements of the Executive Department relating to the disposition of Indian lands reflect the same view of the nature and attributes of the Indian title.

Reviewing the acts of Congress on the subject Attorney General Stone in the beforementioned opinion to the President stated:

> "If the extent of the Indian rights depended merely on definitions, or on deductions to be drawn from descriptive terms, there might be some question whether the right of 'occupancy and use' included any right to the hidden or latent resources of the land, such as minerals or potential water power, of which the Indians in their original state had no knowledge.[1] As a practical matter, however, that question has been resolved in favor of the Indians by a uniform series of legislative and treaty provisions beginning many years ago and extending to the present time. • • • Then, begin-

[1] Even this academic doubt would not exist with respect to timber because of course the Indians *did* have knowledge of that.

ning years ago, many special acts were passed (with or without previous agreements with the Indians concerned), whereby surplus lands remaining to the tribe after completion of the allotments were to be sold for their benefit. *In all these instances Congress has recognized the right of the Indians to receive the full sales value of the land, including the value of the timber, the minerals, and all other elements of value,* less only the expenses of the government in surveying and selling the land. • • •

"Similar provisions have been made in many other cases for the sale of surplus tribal lands, *all the proceeds of all elements of value to go to the tribe.* • • •" 34 Ops. A. G. 178-179. [Italics ours.]

Reflecting the view of the executive branch of the Government, the Reports of the Commissioner of Indian Affairs time and again treat the beneficial interest in timber on Indian reservations as the property of the Indians. For example:

"The timber interests of Indians on allotted and on tribal lands reach a present value of $84,000,000. • • • the timber on Indian reservations • • • is valued • • • in Oregon at $27,000,000. • • • In 1911 sales of timber brought in for Indians $2,192,000." Report, 1911, pp. 6-7.

Again:

"The property interests of the Indians constitute one of the greatest estates ever held in trust by any organization, governmental or private. Including the lands, forests, water power, minerals, and funds held in tribal or individual ownership, the Indians' principal amounts to approximately three-quarters of a billion dollars, and from this property in rentals and interest there comes annually approximately $12,000,000." Report, 1911, p. 50.

Again:

"The timber holdings of the Indians have stumpage value of more than $80,000,000. • • •

> "The Indians own tribal and individual timber valued at more than $80,000,000, * * *." Report, 1913, pp. 2-4.

The title of the Klamath Tribes is no different from that by which Indian tribes in general hold their reservations. Indeed the Treaty of 1864 in Article I expressly provides that the area set apart as a residence for the Klamath Tribes shall be "held and regarded as an Indian Reservation." Finding IV, R. 21.

And Article VI, in making provision for the subsequent allotment of the lands of the Reservation among the members of the Klamath Tribes, recognized their right to the whole beneficial interest in the lands. For, as stated in the before mentioned opinion of Attorney General Stone,

> "the treaty provisions for the allotment of reservation lands all contemplate the final passing of a perfect fee title to the individuals of the tribe. And that meant, of course, that minerals and all other hidden or latent resources would go with the fee. The same is true of the General Allotment Act of 1887, which applies expressly to executive order reservations as well as to others." 34 Ops. A. G. 171, 178.

In *California & Oregon Land Co.* v. *Worden*, 85 Fed. 94, 96, cited in *Mille Lac Band of Chippewas* v. *United States*, 46 Ct. Cl. 424, 464, referring to the title of the Klamath Tribes, it was held that—

> "For all purposes, therefore, save only that of private sale, the Indians were in fact the owners of these lands."

Also, in *United States* v. *California & Oregon Land Co.*, 192 U. S. 355, 48 L. ed. 476, the Government described the title of the Klamath Tribes as follows:

> "The right of occupancy * * * is the real ownership. It is the full title, or as much title as, under

our conception, any other than the sovereign usually holds." First brief, October Term, 1901, pp. 25-26.

And again:

> "The Government never had any real ownership of these Klamath Reservation lands, but only a possibility of acquiring an ownership." Supplemental Brief, October Term, 1902, p. 16.

In the recent Act of March 4, 1933, c. 275, 47 Stat. 1568, relating to contracts for the sale of timber on Indian lands, Congress recognized that the beneficial interest in timber on the Klamath Reservation belongs to the Indians.[1]

The words, "until otherwise directed by the President of the United States," in Article I of the Treaty creating the Reservation, Finding IV, R. 21, and the provision in Article XI that the United States may locate other tribes upon this Reservation, Finding IV, R. 21, do not (as the Government contends here and as it contended unsuccessfully below) make the title of the Klamath Tribes any different from the title of Indian tribes generally.

The United States has always asserted the right to remove Indians from a reservation, and to locate other tribes on a reservation, upon making compensation, of course, or some equivalent provision for the Indians who are dispossessed. See *Buttz v. Northern Pacific R. R. Co.*, 119 U. S. 55, 66-68, 30 L. ed. 330, 334-335; *Missouri K. & T. R. R. Co. v. Roberts*, 152 U. S. 114, 116-118, 38 L. ed. 377, 379; *Cherokee Nation v. So. Kans. R. Co.*, 135 U. S. 641, 654-657, 34 L. ed. 295, 301-302.

In *California & Oregon Land Co. v. Rankin*, 87 Fed. 532, it was expressly held that the words "until otherwise di-

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[1] The Act provides: "* * * That hereafter no contract of sale of *Indian timber* on the Klamath Indian Reservation in Oregon shall be entered into without the *consent* of the said general council." [Italics ours.]

rected by the President of the United States," in Article I of the Klamath Treaty, were not words of limitation so far as the Indian title was concerned. Thus:

> "The President can only direct the removal of these Indians in their interest. The right provided for as to this is not a limitation of the right of occupancy theretofore enjoyed by them, but a provision to make effective the authority to dispose of that right when the United States, acting in their behalf, determines that it is to their advantage that such interest should be sold." P. 533.

Or, it might be added, to make effective Article VI of the Treaty providing for the allotment of the Reservation in the discretion of the United States among the individual members of the Tribe.

Similarly, in *United States* v. *California & Oregon Land Co., ante,* 16, referring to this same language of the Klamath Treaty, the Government itself maintained that—

> "Of course, the phrase about the discretion of the President, taken in connection with the remainder of the treaty, can be seen to be a mere acknowledgment of the general dependence of the Indian tribes on the United States and submission to its future policy. It was not intended to reduce the title of the Indians in any way to the lands they had already owned and had not been paid for and make them holders of a mere tenancy at will of their beneficial ownership or right of occupancy." First brief, October Term, 1901, p. 25.

Any other construction of the Treaty would put the Indians in the position of ceding to the United States the vast area of land in the States of Oregon and California which they held under an undisputed title by immemorial possession, Finding II, R. 21, for a paltry pecuniary consideration (Article II of Treaty), and with no provision

for a place in which to live except a mere tenancy at will in a small fraction of the ceded territory.

Of course, it is impossible to believe that either party to the Treaty intended any such result, much less the Indians. To hold otherwise would make a mockery of the rule that treaties with the Indians must be construed "in the sense in which they would naturally be understood by the Indians." *Jones* v. *Meehan*, 175 U. S. 1, 11, 44 L. ed. 49, 54; *Marlin* v. *Lewallen*, 276 U. S. 58, 64, 72 L. ed. 467, 469; *Worcester* v. *State of Georgia*, 6 Pet. 515, 582, 8 L. ed. 483, 508; *Choctaw Nation* v. *United States*, 119 U. S. 1, 28, 30 L. ed. 306, 315.

Furthermore, Article XI expressly provided that in consenting to the location of other tribes upon their Reservation the Klamath Tribes did not forfeit any of their rights under the Treaty.

IV.

As to the finding of the Court of Claims that the Indians made no claim for additional compensation for the 87,000 acres prior to the filing of the petition in this case.

The Government gives prominence to this finding as if it attached importance to it.

In their motion in the Court of Claims for amended findings of fact the plaintiffs asked that this finding be stricken out on the ground that there was no evidence at all to support it, and at the same time exhibited certified copies of records of the Department of the Interior showing three different complaints by the Indians, prior to the passage of the jurisdictional act, in respect of the settlement made with them for the 87,000-acre tract.

The Court of Claims adhered to its finding. The plaintiffs did not pursue the matter further because they were

advised that if their claim for additional compensation for the 87,000 acres is within the description of claims authorized by the jurisdictional act to be submitted to the Court of Claims, it is immaterial whether or not they have protested that the amount heretofore received by them was inadequate.

Respectfully submitted,

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